IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 660 OF 2001

Vijaykumar Taranlal Gaggad
Age: 46 years, Occ.: Business,
R/o.Vinchur, Tal. Niphad. .... Appellant.

Versus.

1. Popat Bahinaji Chavan,
Age: 49 years.
2. Rajendra Popat Chavan,
Age: 27 years,
Both's Occ.: Agriculture and
Business, residents of
Vichur, Taluka Niphad. .... Respondents.

Shri V.S.Gokhale for the Appellant.

Shri S.M.Sabrad for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 19th August, 2004.

ORAL JUDGMENT.

1. On 14th September 2001, this Court issued notice before admission with a direction that the appeal will be disposed of finally at the stage of admission. Accordingly I have taken up the Second Appeal for final hearing. After having heard the learned Counsel appearing for the parties, I find that the following substantial questions of law arise in the Second Appeal:

(i) Whether document Exh.18 is a primary evidence and whether it is duly proved and can be read as an evidence ?

(ii) What is the interpretation and scope of sec.62 of the Indian Evidence Act ?

(iii) Unless the document is duly proved, whether the Court will not be empowered to compare signature on the document with the signature on admitted documents?

I have heard the learned Counsel appearing for the parties on the aforesaid substantial questions of law.

2. The Appellant is the Plaintiff. The case of the Appellant is that he is carrying on business of sale of fertilisers. The case of the Appellant is that the Respondent No.1 is the father of Respondent No.2 and they formed a joint Hindu Family. The Respondent No.1 is the karta of the Joint Hindu Family. The case of the Appellant is that on 2nd February 1994, the Respondent No.2 purchased in the name of Respondent No.1 certain fertilisers at a cost of Rs.11,600/- and accordingly the Appellant issued a credit memo in favour of the

Respondent No.2. The Respondent No.2 signed the said credit memo and agreed to pay the price of the goods sold within a period of 15 days failing which he agreed to pay interest on the said amount at 18% per annum. As the Respondents failed to pay the amount, on 17th February 1995 a notice was sent by the Advocate for the Appellant to the Respondents. The Respondents No.1 accepted the notice and the Respondent No.2 declined to receive the notice. As the amount was not paid, money suit was filed by the Appellant.

3. The Respondents filed written statement and came out with a case of complete denial. The trial Court decreed the suit filed by the Appellant. In an appeal preferred by the Respondents, the Appellate Court interfered and decree passed in favour of the Appellant has been set aside. The Appellant has taken exception to the judgment and decree of the Appellant by preferring this Second Appeal.

4. The learned Counsel appearing for the Appellant submitted that the Appellate Court committed a factual error by coming to the conclusion that the Appellant has produced only a zerox copy of the carbon copy of the bill. He submitted that the Appellate Court committed an error by holding that the Appellant has not stated on

oath that the carbon copy was prepared simultaneously in his present while preparing the original bill. He submitted that the finding recorded by the Appellate Court in paragraph 6 is perverse. The learned Counsel pointed out that the Appellant in his deposition clearly stated that the bill was prepared by his younger brother in his presence and he was present when the same was signed and he identified the signature of Respondent No.2 on the said bill. The learned Counsel submitted that in view of this, the Appellate Court committed gross error by holding that the bill was not proved. He also pointed out that the Respondent No.2 who stepped into the witness box went to the extent of stating that he was not admitting the contents of the Written Statement. The learned Counsel pointed out that the Appellate Court found explanation for the said lapse on the part of the Respondent No.2 by stating that he answered the question without understanding the meaning of the written statement. The learned Counsel submitted that the Judgment of the Appellate Court is perverse.

5. The learned Counsel appearing for the Respondents supported the Judgment and Decree of the Appellate Court. He submitted that the findings recorded by the Appellate Court are essentially a findings of fact and cannot be interfered in a Second Appeal. He submitted

that when it was the specific case of the Appellant that the bill/credit note was prepared by the younger brother of the Appellant, the bill could have been proved only by the younger brother of the Appellant and not by the Appellant.

6. I have considered rival submissions. The trial Court has considered the various aspects. The trial Court considered the fact that the demand notice was served on the Respondents and no reply was given to the demand notice. The trial Court also relied upon the statement made by the Respondent No.2 in his cross-examination that the contents of his Written Statement were not correct. The trial Court held that the bill was proved and therefore, proceeded to pass a decree.

7. In this case there was a word against word. The case made out by the Appellant was completely denied by the Respondent. Therefore, the trial Court and the Appellate Court which were the Courts of facts were required to appreciate oral and documentary evidence on record and accept the case of one of the parties and reject the other. On appreciation of the evidence on record, the trial Court held that the bill evidencing sale of fertiliser having the price of Rs.11,600/- has

been proved. Apart from the proof of the said bill, the trial Court considered one important circumstance that the demand notice was not replied by the Respondents. The trial Court also examined the veracity of the contentions of the Respondent No.2 in his evidence by referring to the statement made by him that he was not admitting the contents of his own written statement. In the circumstances, the trial Court disbelieved the case made out by the Respondents and accepted the case of the Appellant.

8. It is true that the findings recorded by the Appellate Court are essentially findings of fact. However, it is well settled position that if a document which is duly admissible in evidence and which is duly proved is not considered by the Appellate Court, the same will give rise to substantial question of law. If the findings of the Appellate Court are perverse, interference is permissible under section 100 of the Code of Civil Procedure, 1908.

9. If the evidence of the appellant perused, it is very clear that at the time of evidence he brought to the Court carbon copy of the credit note and in the evidence he produced a zerox copy of the said carbon copy which was duly verified by the Assistant Superintendent of the

Court. It is recorded in the deposition that the zerox copy was compared by the Court with the carbon copy brought to the Court by the Appellant. In the deposition the Appellant has clearly stated that the bill was prepared in his presence and when it was signed he was in the shop. He also identified the signature of the Respondent No.2 on the said bill. It is not the case made out in the cross-examination of the Appellant that the Respondent No.2 did not sign the bill in the presence of the Appellant. However, the case made out is of a complete denial of the transaction. The Appellate Court has committed a gross error by observing that only a zerox copy of the carbon copy was produced. The Appellate Court has not read material aspect in the deposition of the Appellant that the original carbon copy was brought to the Court and a zerox copy prepared from the carbon copy was verified by the Assistant Superintendent on the basis of the carbon copy. When the Appellant has stated that the document brought by him was a carbon copy of the original bill, it was obviously not necessary for the Appellant to state on oath that the carbon copy of the bill was prepared simultaneously along with the original bill. When the Appellant stated that it was the carbon copy of the original bill obviously it was prepared along with the original as it was a carbon copy of the original.

Therefore, the Appellate Court has committed perversity by holding that the original carbon copy being primary evidence is not produced. The Appellate Court committed the second error by misreading the evidence of the appellant. In examination-in-chief, the Appellant has clearly stated that he was present on 2nd February 1994 in the shop when the Respondent No.2 purchased the goods and the bill was prepared by his younger brother in his presence and was signed in his presence. The Appellate Court ignoring the said statement in examination-in-chief has held that the Appellant has not stated in the evidence that the Respondent No.2 has signed the bill in his presence. Therefore, the finding of the Appellate Court that the document is not duly proved will have to be set aside.

10. As stated earlier, the case of the Respondents is of total denial. The said case was disbelieved by the trial Court on the basis of two aspects, firstly the Respondent No.2 on oath has stated that he was not admitting the contents of the written statement and therefore, he could not be believed and the second reason given is that no reply was given to the demand notice. So far as the first aspect is concerned, the Appellate Court invented a case on its own that when question was asked to the Respondent No.2 regarding

contents of the written statement, he answered the said question without understanding the meaning of the term "written statement". Such a case obviously was not made out by the Respondent No.2. Therefore, on that ground the important statement made by the Respondent No.2 could not have been discarded. The learned trial Judge had opportunity to observe the demeanour of the Respondent No.2 in the witness box. The trial Court rejected the case of the Respondent No.2 as his version was found untrustworthy as he even denied the correctness of the contents of his written statement. In paragraph 10 of the Appellate Court Judgment it is clearly stated that the Judgment of the trial Court is reversed on the ground that the bill was not duly proved by the Appellant and undue importance was given by the learned trial Judge to the reply given by the Respondent No.2 in the cross-examination as regards the contents of the written statement. It is obvious that the Appellate Court has treated the bill as not proved though it was duly proved and was admitted in evidence by the trial Court. The statement of the Respondent No.2 in cross-examination is disregarded by the Appellate Court on erroneous assumption that the said statement was made without understanding the meaning of the term "written statement". If the decree of the trial Court is set aside only on the grounds as recorded in paragraph 10 of

the Judgment of the Appellate Court, it must be held that the Judgment of the Appellate Court is perverse. Such Judgment is required to be interfered with in Second Appeal under section 100 of the said Code.

11. Hence the following order:

(i) The Appeal is allowed.

(ii) The impugned Judgment and Decree dated 23rd July 2001 passed by the Appellate Court is quashed and set aside and the Judgment and Decree dated 20th February 1997 passed by the trial Court is restored.

(iii) No order as to costs.

Judge.